Re Estate of Chong Swee Lin; Kam Soh Keh v Chan Kok Leong & Ors

HIGH COURT (KUALA LUMPUR) — PETITION NO S5–31–359–93
JAMES FOONG J
25 APRIL 1996

Family Law *— Marriage — Chinese customary — Proof of — Question of validity*

Succession *— Letters of administration — Application for — Petition by husband — Caveat lodged by children — Whether petitioner was lawful husband of the deceased — Whether petitioner entitled to grant of letters of administration*

The petitioner, claiming to be the lawful husband of the deceased, filed a petition for letters of administration to the deceased's estate. The petition was contested by the respondents. They claimed that the petitioner was never the lawful husband of the deceased and as such, he should not be entitled to be the administrator of the estate. The respondents contended that they should be made administrators since they were the lawful children of the deceased. The petitioner however, stated that he and the deceased got married by way of a Chinese customary marriage ceremony which involved hosting a dinner for a few of their friends. The petitioner also produced a marriage certificate which he had purchased from a Chinese book store which was filled up and signed by the petitioner and the deceased as husband and wife, the signing being witnessed by two of the friends present at that dinner. It was further asserted by the petitioner that he and the deceased had resided together in a flat after they were married. The issue for consideration therefore was whether the petitioner was the lawful husband of the deceased.

Held, dismissing the petition:

(1) The law merely required a Chinese customary marriage to be a consensual marriage with an agreement to form a relationship that came within the English definition of marriage. The specific requirements needed to fulfil certain vital elements of Chinese customary marriage rites were only ceremonies to evidence the intention of the parties to tie the marital knot. Such intention however, could be implied and expressed in other forms, the clearest of which would be a formal contract in writing, which would be conclusive. There was, however, no established format in the completion of this document as long as the contents of the document disclosed the intention of the parties to be married, and it was witnessed by one or more persons (see p 471E–H); *Re Lee Gee Chong (deceased), Tay Geok Yap v Tan Lian Cheow* [1965] 1 MLJ 102 and *The Estate of Yeow Kian Kee (deceased), Er Gek Cheng v Ho Ying Seng* [1949] MLJ 171 followed.

(2) There was a material contradiction between the evidence given by the only surviving witness who signed the marriage certificate and that by the petitioner. Grave doubts therefore were cast on the authenticity of the document. Moreover, based on the surrounding circumstances, the signature purported to be that of the deceased on the marriage certificate could not have been that of the deceased (see p 472G).

(3) The evidence tendered by the petitioner was not sufficient to justify a finding of a consensual marriage between the petitioner and the deceased. Contrary to the petitoner's claim that he had cohabited with the deceased, there was evidence to show that he was merely a tenant residing in one of the rooms in the flat (see pp 473I–474A).

(4) The petitioner, having failed to satisfy the court that he was lawfully married to the deceased, should be refused his application to be the administrator of the deceased's estate, for he was not one who could be said to be lawfully entitled to have an interest in the residuary of the deceased's estate (see p 473F–G).

[Bahasa Malaysia summary

Pempetisyen yang mendakwa dirinya sebagai suami si mati yang sah telah memfailkan satu petisyen untuk surat kuasa mentadbir harta pusaka si mati. Petisyen tersebut ditentang oleh penentang. Mereka mendakwa bahawa pempetisyen tidak pernah merupakan suami si mati yang sah dan oleh yang demikian tidak berhak menjadi pentadbir harta pusaka. Penentang telah berhujah bahawa mereka sepatutnya menjadi pentadbir kerana mereka adalah anak-anak si mati yang sah. Namun demikian pempetisyen telah menyatakan bahawa dia dan si mati telah berkahwin menurut perkahwinan adat istiadat kaum Cina yang melibatkan suatu majlis makan untuk beberapa orang kawan mereka. Pempetisyen juga telah mengemukakan suatu sijil perkahwinan yang dibelinya dari sebuah kedai buku Cina yang telah diisikan dan ditandatangani oleh kedua-dua pempetisyen dan si mati sebagai suami isteri, penandatanganan itu disaksikan oleh dua orang kawan yang hadir di majlis makan itu. Ianya selanjutnya telah dinyatakan oleh pempetisyen bahawa dia dan si mati telah menetap bersama-sama di sebuah rumah pangsa setelah mereka berkahwin. Isu untuk dipertimbangkan adalah sama ada pempetisyen merupakan suami si mati yang sah.

Diputuskan, menolak petisyen:

(1) Undang-undang cuma memerlukan satu perkahwinan adat istiadat kaum Cina menjadi satu perkahwinan berasaskan persetujuan bersama dengan persetujuan untuk membentuk satu hubungan yang termasuk dalam takrif perkahwinan Inggeris. Keperluan-keperluan spesifik yang diperlukan untuk memenuhi unsur-unsur penting untuk suatu perkahwinan mengikut adat

istiadat kaum Cina hanya adalah upacara untuk membuktikan niat pihak-pihak untuk berkahwin. Niat tersebut, walau bagaimanapun, boleh disiratkan ataupun dinyatakan dalam beberapa bentuk lain, di mana yang jelas sekali merupakan kontrak bertulis formal yang akan menjadi muktamad. Namun demikian, tidak ada bentuk tetap untuk pengisian dokumen itu asalkan kandungan dokumen itu menunjukkan niat piahk-pihak untuk berkahwin (lihat ms 471E–H); *Re Lee Gee Chong (deceased), Tay Geok Yap v Tan Lian Cheow* [1965] 1 MLJ 102 dan *The Estate of Yeow Kian Kee (deceased), Er Gek Cheng v Ho Ying Seng* [1949] MLJ 171 diikut.

(2) Terdapat percanggahan yang material di antara keterangan yang diberikan oleh saksi tunggal yang masih hidup yang menandatangani sijil perkahwinan itu dan keterangan yang diberikan oleh pempetisyen. Maka terdapat keraguan yang serius berkenaan dengan kesahihan dokumen tersebut. Lagipun, berdasarkan keadaan sekeliling, tandatangan yang dikatakan adalah tandatangan si mati atas sijil perkahwinan itu tidak mungkin merupakan tandatangan si mati (lihat ms 472G).

(3) Keteranan yang dikemukakan oleh pempetisyen tidak mencukupi untuk menyokong satu dapatan satu perkahwinan berasaskan persetujuan di antara pempetisyen dan si mati. Bertentangan dengan tuntutan pempetisyen bahawa dia telah menetap bersama-sama dengan si mati, terdapat keterangan yang menunjukkan bahawa dia hanya merupakan penyewa yang menetap dalam salah sebuah bilik rumah pangsa tersebut (lihat ms 473I–474A).

(4) Pempetisyen, setelah gagal memuaskan mahkamah bahawa beliau telah berkahwin dengan si mati secara sah, tidak patut dibenarkan menjadi pentadbir harta pusaka si mati, kerana beliau bukanlah seorang yang boleh dikatakan berhak di sisi undang-undang untuk mendapat kepentingan di dalam bakian harta pusaka si mati (lihat ms 473F–G).]

Notes

For cases on proof of Chinese customary marriages, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2086–2089.

For cases on petition by spouses for letters of administration, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1933–1935.

Cases referred to

Estate of Yeow Kian Kee (deceased), The; *Er Gek Cheng v Ho Ying Seng* [1949] MLJ 171 (folld)

Lee Gee Chong (deceased), Re; *Tay Geok Yap & Ors v Tan Lian Cheow* [1965] 1 MLJ 102 (folld)

Yeap Leong Huat v Yeap Leong Soon & Anor and another application [1989] 3 MLJ 157 (refd)

Legislation referred to

Distribution Act 1958
Evidence Act 1950 s 73(1)
Law Reform (Marriage and Divorce) Act 1976 s 4
Probate and Administration Act 1959 s 30
Rules of the High Court 1980 O 71 rr 37(14), 38(1), 38(2)

Felix Dorairaj (*Dorairaj, Low & Teh*) for the petitioner.
SK Liow (*Liow & Co*) for the respondents.

James Foong J: Chong Swee Lin ('the deceased') died on 21 February 1993 as a result of a motor accident in Genting Highlands. On 12 November 1993, the petitioner, claiming himself to be the lawful husband of the deceased, filed a petition for letters of administration to the deceased's estate. A caveat was posted by one Chan Kok Leong ('the respondent') against this petition and after a warning was issued, the respondent entered appearance. By this act, this petition is considered as contested under O 71 r 37(14) of the Rules of High Court 1980 ('the RHC 1980'). This case was duly referred to the judge of the High Court, who then ordered it to be disposed of summarily under the powers granted to him under O 71 r 38(1) of the RHC 1980.

In accordance with O 71 r 38(2) of the RHC 1980, this matter was heard in open court. Besides affidavits being referred to, the makers of these affidavits were also cross-examined. Included during this hearing with the consent of all parties were several other witnesses who tendered oral evidence.

From the evidence adduced, the respondent together with his sisters, Chan Suit Foong and Elizabeth Chang Loong Yoke (who were later added as the second and third respondents respectively) are children of the deceased. They claimed that the petitioner was never the lawful husband of the deceased and as such should not be entitled to be the administrator of the estate of the deceased. They being the lawful children should be made administrators.

In determining who will be a suitable administrator of a deceased's estate, s 30 of the Probate and Administration Act 1959 provides as follows:

> In granting administration the court shall have regard to the rights of all persons interested in the estate of the deceased person or in the proceeds of sale thereof, and, in particular, administration with the will annexed may be granted to a devisee or legatee; and in regard to land settled previously to the death of the deceased, and not by his will, administration may be granted to the trustees of the settlement; and any such administration may be limited in any way the court thinks fit:
>
> Provided that, where the deceased died wholly intestate as to his estate, administration shall, if application is made for the purpose, be granted to some one or more of the persons interested in the residuary estate of the deceased, unless by reason of the insolvency of the estate, or other special

circumstances the court thinks it expedient to grant administration to some other person. A

By the above provision, inevitably for the purpose of this case, the person most suitable to be the administrator would be the beneficiary of the deceased's estate. If the petitioner is the lawful husband, it is obvious that under the Distribution Act of 1958 he would be the sole beneficiary of the B deceased's estate, since the deceased died intestate. Being the sole beneficiary, he should be the appropriate person to be appointed administrator. On the other hand, if the petitioner is not the lawful husband then the respondents should be the administrators as they are persons interested in the residuary estate of the deceased, being once again beneficiaries. There is no contest on the relationship of the respondents C with the deceased, for as from the evidence so far adduced, the petitioner has admitted that they are the deceased'd children. Therefore, the true issue of this whole case centered upon whether the petitioner was the lawful husband of the deceased.

The petitioner testified that he first met the deceased on Christmas D Eve of 1976 at a night club where she was a singer. They got married on 2 January 1981 by way of a Chinese customary marriage ceremony. This involved the petitioner and the deceased hosting a dinner for three male friends of the petitioner and two female friends of the deceased at a Chinese restaurant in Jalan Peel, Kuala Lumpur. At this dinner, the E petitioner alleged that he announced to the gathering that he and the deceased were getting married. A Chinese marriage certificate which the petitioner had purchased earlier from a Chinese book store was then filled up and signed by the petitioner and the deceased as husband and wife. Two of the petitioner's male friends present also signed, one as an 'introducer' and the other as a 'witness'. The original of this document was F produced in court marked as exh P1.

The petitioner then continued to assert that he and the deceased resided in a three-bedroom flat known as Selayang Flats in Kuala Lumpur after they were married. To further support the contention that he and the deceased were married, the petitioner produced a Tung Shen Hospital G identification document (exh P4) which he purports to have been completed and signed by the deceased in 1985 naming him as the husband. This was followed by a letter written by the deceased to Bandaraya on 23 January 1986 which states that the petitioner was her husband. Two witnesses testified that the deceased was known to them as the petitioner's wife. More importantly, PW2, Chong Tian Yook, the person who signed as an H 'introducer' on exh P1, also appeared in court to testify that he was indeed at the wedding dinner and supported the petitioner's version that the deceased executed exh P1 at the material time.

The respondents strenuously questioned the authenticity of exh P1: firstly whether it was a proper document to evidence a Chinese customary I marriage; secondly, the signature of the deceased could not have been genuine; and thirdly, that this event never ever took place.

DW2, one Sum Yoke Kwai who claimed to be an adopted daughter of the deceased, affirmed that the petitioner could not have met the deceased in December 1976, for at this material time, the deceased was still in confinement after having given birth to the third respondent, Elizabeth Chang. She insisted that the petitioner only knew the deceased in March 1982, and though the petitioner did reside in Selayang Flats, he was only an occupier of a room in the flat, and was never staying together with the deceased in the same room as husband and wife.

One Pauline Cheong (DW1), the sister-in-law of the deceased, gave evidence that the deceased had never stayed together with the petitioner. According to her, the deceased was a promiscuous lady who had other male friends sleeping with her at the material time the petitioner claimed he was with the deceased. For example, she tendered a photograph showing the deceased in a residential house occupied by a Korean businessman whom she said was the lover of the deceased and the deceased had resided here with him from 1986–1987.

Most of the respondents and/or their witnesses claimed that the petitioner was only a business partner of the deceased in a pub-cum-restaurant called 'My Kung' at Jalan Raja Laut in Kuala Lumpur. This establishment, they asserted, belonged to the deceased, but since the petitioner was the holder of the business licence of this outlet, the deceased was forced to pay the petitioner RM1,000 per month for the use of the licence. Differences between the petitioner and the deceased surfaced in 1990 over the accounts of the business and by this time the petitioner also left Selayang Flats.

A substantial part of the respondents' case also centered upon the issue as to what constitutes a valid Chinese customary marriage. This factor is essential as the petitioner claimed that his marriage to the deceased had taken place before the coming into force of the Law Reform (Marriage and Divorce) Act 1976 which, by s 4, recognizes subsisting valid marriages solemnized under any law, religion, custom or usage before the Act became effective. An expert witness (DW3) was called to give a detailed account of the importance of a tea ceremony before the bridegroom's parents and elders, including ancestral worship in the bridegroom's house by the married couple which are essential ingredients of a Chinese customary marriage. Given the fact that such rites were not performed by the petitioner and the deceased, their marriage could not have been properly constituted. An offer of a drink by the petitioner to the deceased's mother at Genting Highlands in the absence of the deceased after their purported marriage, in the opinion of DW3, did not constitute a proper tea ceremony for the purpose of fulfilling the requirements of a Chinese customary marriage.

In the submission of the respondents' counsel, the issue of the deceased's first and/or second marriage was also emphasized. It was not denied by all parties to this case that the deceased was married to one Chan Peng San who fathered the first and second respondents. However, the petitioner claimed that the deceased and Chan Peng San were divorced but the respondents insisted that the marriage subsisted until the time of

the deceased's death. In the alternative, the respondents submitted that even if this marriage was dissolved, there could be the existence of a second marriage by the deceased to one Frances Chang, who fathered the third respondent. Thus, in any event, the deceased and the petitioner could not have been married as the Chinese customary laws do not allow a woman to be polygamous as only a man is entitled to this privilege.

It is not disputed that Chinese customary laws have been recognized in this country. In fact, Lee Hun Hoe CJ (Borneo) in the Supreme Court case of *Yeap Leong Huat v Yeap Leong Soon & Anor and another application* [1989] 3 MLJ 157 at p 161, reiterated that:

> Alongside the common law and customary law of the Kadazans, Ibans and other peoples of Malaysia and Singapore, Chinese customary law was also given recognition by the courts and legislature.

The Chinese customary laws relating to marriage have been extensively discussed by our courts over the years but most of these refer to the customary marital rites governing a secondary wife commonly known as 't'sip'. In any event, by virtue of *The Estate of Yeow Kian Kee (deceased); Er Gek Cheng v Ho Ying Seng* [1949] MLJ 171, the importance of the fulfilment of certain Chinese customary marital rites to fulfil the requirements of a marriage has been reduced in significance. Here, Murray-Aynsley CJ set forth a specified legal approach to determine the recognition of a marriage either by a Chinese man to his principal wife ('t'sai') or to his secondary wife ('t'sip').

At p 173 of the report, the learned judge had this to say:

> In the case of Chinese marriages, in most cases, the ceremonies regarded as essential at the time of *Six Widows Case* 12 SSLR 120 have disappeared and there remains a simple form of consensual marriage, quite in conformity with the requirements of the Canon Law.

At p 172, the learned judge added as follows:

> The legal requirement for marriage with a t'sai and a t'sip is, I think, the same. This means that the law of this colony merely requires a consensual marriage, that is, an agreement to form a relationship that comes within the English definition of marriage.

Finally at p 173, the learned judge expressed that:

> ... In most cases there is some sort of a ceremony, and there is recognition of the t'sip as a member of the husband's family. But this is evidentiary only. It is not essential to the acquisition of the status of t'sip. A formal contract in writing would be conclusive.

And for the customary rites and ceremonies, the learned judge at p 173 stated as follows:

> ... I think in these cases the observances of rites and ceremonies is merely evidence of intention.

A These principles were adopted by the Federal Court of Singapore in *Re Lee Gee Chong (deceased); Tay Geok Yap & Ors v Tan Lian Cheow* [1965] 1 MLJ 102, where the views of Wee Chong Jin CJ (Singapore) were expressed as follows at pp 109–110:

> I have set out at length parts of the judgment of Murray-Aynsley CJ [in the
B case of *The Estate of Yeow Kian Kee (deceased); Er Gek Cheng v Ho Ying Seng*] to show that in my view, although he has not expressly referred to the many earlier cases on the question in issue, he has considered them and to show that in his opinion for a woman to acquire the status of a secondary wife, the law of Singapore merely requires a consensual marriage, that is, an agreement to form a relationship that comes within the English definition of
C marriage.

Mr Liow, the respondents' counsel, had pointed out to this court that all the cases cited related to the issue on the recognition of a secondary wife whilst in our present case it centered upon the principal wife. In the opinion of this court, this question has been clearly answered in the
D judgment of Murray-Aynsley CJ in *The Estate of Yeow Kian Kee (deceased); Er Gek Cheng v Ho Ying Seng* [1949] MLJ 171, where he had included the application of this legal principle to both 't'sai', the principal wife, as well as the 't' sip', the secondary wife.

In view of the above authorities which are binding upon this court,
E particularly the Federal Court decision of *Re Lee Gee Chong (deceased); Tay Geok Yap v Tan Lian Cheow* [1965] 1 MLJ 102, this court finds that the evidence tendered by the respondents in respect of the requirement to fulfil certain vital elements of Chinese customary marriage rites, such as the tea ceremony and the burning of joss sticks as a blessing to the bridegroom's ancestors are only ceremonies to evidence intention of the
F parties to tie the marital knot. Besides and apart from this, the intention can be implied or expressed in other forms, the clearest of which would be a formal contract in writing, which in the opinion of the learned Chief Justice in *Er Gek Cheng*'s case 'would be conclusive'. This practice of couples signing a marriage document completed with material particulars,
G according to Mr Lai (DW4), the expert witness had in fact been adopted in China after the fall of the Ching dynasty and with the establishment of a republic in that country. There is, in the opinion of this court, no established format in the completion of this document, though by way of common practice according to evidence tendered in this court, it should all be in Chinese characters with four other persons executing thereon
H besides the married couple. They are the two 'introducers' and two 'witnesses' respectively.

This requirement to follow the common practice, in the opinion of this court, is unnecessary, since after all if the Chinese customary marital rites are only evidence of an intention to marry, what more necessity is
I there for strict adherence in the completion of a document. As long as the contents of the document disclose the intention of the parties to be married, and the same is witnessed either by one or more persons, it becomes a piece of evidence to indicate the consensus of the parties to

enter into matrimony. Similarly, the absence of a photograph attached to this document should in no way invalidate this piece of evidence. A

Having established the above, this court shall now proceed to examine exh P1 and the surrounding circumstances when it was executed particularly by the deceased to determine its authenticity. The first should be the signature of the deceased. For comparison of the deceased's signature under s 73(1) of the Evidence Act 1950, various signatures of the deceased found in four of her previous passports (exhs D10A–D), an insurance indemnity form (exh D9) and a power of attorney (exh P6) which she gave to the petitioner were used by this court. After careful perusal, this court is of the opinion that the signature purported to be that of the deceased in exh P1 could not have been that of the deceased. On all the documents accepted by the parties for comparison, ie exhs D10A–D, D9 and P6, there is a strong stress on the capital letter 'C' to begin the word 'Chong'. This emphasis is so prominent that a tail is attached to the alphabet C as can be seen in exhs D10A, D, C and D9. In exh P1, there is no emphasis whatsoever at the beginning of this letter 'C'. The next is the alphabet 'g' which has a gradual hook on all the signatures tendered for comparison, whilst on exh P1 this hook is of a most irregular nature. B C D

Of the four persons who executed on exh P1, only two survived, the petitioner and PW2. The person who signed as a 'witness' has also passed away. PW2, the 'introducer' who had not only witnessed what took place but who had also signed on exh P1, testified in the most affirmative of manner that he only signed one document similar to that of exh P1. However, the petitioner has contradicted this and in his testimony when questioned by this court, he specified as follows: E

> P1 boleh diberi dari kedai buku. Saya beli dua buku. Semua pihak berkenaan ada tanda tangan ke atas dua buku. Satu buku saya simpan dan lagi satu disimpan oleh si mati. F

This is a material contradiction between the evidence of the only two surviving persons who were supposed to be at the scene to support an important contention that the deceased and the petitioner had signed a vital piece of document to evidence their consensual marriage. Since their evidence was contradicted on such material particulars, this court had no choice but to cast grave doubts on the authenticity of exh P1. G

Another factor of importance is that both PW2 and the petitioner seemed to have forgotten many significant particulars on the day when the marriage was supposed to have been solemnized. The names of the two female friends who were also present at the material time and the name of the restaurant where they were celebrating such a memorable occasion could not be identified. With these and those as stated aforesaid, this court finds that exh P1 could not have been executed by the deceased as alleged. H

As for the rest of the evidence tendered by the petitioner, this court finds that none of them is sufficient to justify a finding of a consensual marriage between the parties. Though the petitioner claimed that he had cohabited with the deceased at Selayang Flats, there was ample evidence I

from other witnesses to explain that he was more likely a tenant residing in one of the rooms at the rear. These witnesses were not mere outsiders but close relations of the deceased who most of the time lived or visited this place of abode at the material time. In any event, Murray-Aynsley CJ in *The Estate of Yeow Kian Kee (deceased)*; *Er Gek Cheng v Ho Ying Seng* [1949] MLJ 171, stated (which in the opinion of this court is correct) as follows at p 173:

> ... I do not consider that mere cohabition for a considerable period would by itself be sufficient evidence [to justify a consensual marriage].

On the representation made to friends of the petitioner giving the appearance that the deceased was the petitioner's wife, this court was of the view that that was insufficient to conclude as a fact that the parties were lawfully married. Such casual remarks often occur in everyday life, sometimes to avoid embarrassment and at other times for convenience. It is certainly too informal to support a contention of marriage between the parties especially when this was only mentioned to specific persons and not to the public at large. In the same vein, this court is of the opinion that the document (exh P4) tendered by the petitioner to indicate that the deceased had given the petitioner's name and specified him as her husband in the Tung Shin Hospital information slip is insufficient to evidence a lawful marriage between the parties. From a careful perusal of this document, one cannot arrive at a positive conclusion as to who actually inserted these particulars. The signature of the deceased as a patient is illegible, a far cry from the boldness of stroke in other documents signed by the deceased. Without the maker of this document positively identified, this court cannot seriously consider it as a substantial piece of evidence to support the petitioner's claim.

The petitioner, having failed to satisfy this court that he was lawfully married to the deceased, should be refused his application to be the administrator of the deceased's estate, for he is not one who can be said to be lawfully entitled to have an interest in the residuary of the deceased's estate. The respondents, on the other hand, are the undisputed children of the deceased, and as such are persons who will stand to benefit from the residuary of this estate in the absence of any other claimant. They therefore should be granted letters of administration if they apply. Accordingly, this court hereby rejects the petitioner's petition with cost to the respondents.

Petition dismissed.

Reported by Izzaty Izzuddin